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**Testimony of Hal Bergan**  
**Administrator of the Unemployment Insurance Division**  
**On Senate Bill 366, relating to changes in**  
**Wisconsin's Unemployment Insurance Law**

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Chairman Coggs and members of the Committee:

Thank you very much for the opportunity to appear in support of SB 366. This bill is the product of deliberations by the Unemployment Insurance Advisory Council. The Council consists of 10 members, five representing Wisconsin workers, and five representing Wisconsin employers. The non-voting chair of the Council is Daniel LaRocque, the director of the UI Division's Bureau of Legal Affairs. The Council has a long and distinguished history of serving our state. I particularly want to mention the role played by Phil Neuenfeldt on the labor side and James Buchen on the employer. They are outstanding public servants, deeply knowledgeable about the UI system, and they do an impressive job as Council leaders.

As you know, Wisconsin workers and employers have been hit hard by the deep national economic recession. Since October of 2008, claims for unemployment benefits have been higher than at any time in our history. Every week, we are mailing out over 185,000 checks. We are administering four federal UI benefit extension programs along with the regular UI program. We have taken extraordinary steps to meet these challenges -- hiring more staff, extending our hours, working overtime, improving our systems, and seeking ways to streamline and otherwise improve the administration of the program.

As unemployment has spiked, so has the demand for benefits. As a result, our Unemployment Insurance Reserve Fund finds itself borrowing from the federal government to meet its obligations. Twenty-three states are borrowing now and that number will continue to increase throughout 2009 and 2010. Unemployment Insurance systems in the industrial states of the East and Midwest are particularly challenged by this recession. The Advisory Council understands the importance of this issue and has begun its work to improve the solvency of our UI system. The Council expects to work on recommendations throughout the fall to present to the Legislature.

The bill before you today does not deal with solvency issues. Rather, it consists of a series of changes that will strengthen the program and streamline its administration. These changes will produce a program that is easier to understand for workers and employers and less complex to administer for the UI staff.

## **Provisions of SB 366**

### **Law Changes Relating to Unemployment Insurance Benefits and Recoveries**

#### **Amend Allocation of Benefits for Lump Sum Pension Distributions**

Certain types of income received by unemployment benefit claimants will reduce the amount of their benefits. Some types of income do not reduce benefits -- for example, interest on savings, or gains on the sale of stock or real estate.

Unemployment benefits are reduced based on very specific statutory provisions, for receipt of wages earned during a week of unemployment and for severance pay "allocated" to a week of unemployment. Unemployment benefits are reduced also in certain cases of employer-funded pensions -- those in which the base period employer has contributed to or managed the pension and the employee earned pension credits with that employer during the base period.

The bill amends the reduction of benefits for a claimant's receipt of pension payments in §108.05 (7). Current law provides that pension payments reduce benefits in each week the pension payment is received. A lump sum pension distribution is **allocated** to (treated as received in) a series of weeks, rather than just the single week in which the lump sum was received. The bill provides that a lump sum pension payment (or, in the words of the statute, a pension payment that is "other than periodic") will be allocated to just the week in which it is paid. The receipt of the pension payment will affect unemployment benefits, if at all, for that week only. The lump sum pension payment will no longer be allocated to a series of weeks.

The proposal to alter the lump sum pension offset for unemployment insurance benefits arose from a proposal to the Unemployment Insurance Advisory Council by Representative Terry Van Akkeren. His concern related to a worker who had taken a loan from his 401(k) retirement plan prior to losing his job. The worker was in financial distress and defaulted on his loan. The pension loan default was satisfied

by his pension plan administrator's "distribution" of funds from his 401(k) account ("receipt of a pension payment" in the unemployment law).

The estimated cost to the reserve fund for the additional benefits paid because of this change is \$200,000 per year.

#### **Treat Bonus Payments as "Earned" When Paid**

As mentioned above, wages earned in certain amounts by a claimant while eligible for unemployment insurance benefits may reduce the benefits the claimant receives. Bonus payments are wages. The bill amends the treatment of bonuses (also §108.05) to provide that for purposes of calculating unemployment insurance benefits, a bonus payment is considered "earned" in the week in which the bonus is paid by the employer.

The decision by an employer to pay a bonus is often contingent on various matters. Because of the contingent nature of the employer's decision to pay a bonus, in most cases we find that the week in which a bonus is paid is the same as the week in which the department determines the bonus is finally "earned." However, case law has been inconsistent in applying the concept of "earned." Recent decisions seemed to leave open the possibility of some very difficult challenges for the department in administering the reduction for bonus payments, in some cases at least, and potentially anomalous results to claimants. For example, if the reduction of benefits were required to be made retroactively, as though the bonus paid in one year were considered earned in a prior year or years, benefit reductions might have to be recalculated many weeks or months after payment.

The bill simplifies and clarifies the treatment of bonus payments. It limits the adverse impact on the claimant to one week of benefits, at most. No significant fiscal effect is expected.

#### **Amend Disqualification for Full-Time Work with 80% Liable Employer: Reduce "full-time" from 35 to 32 Hours**

When a claimant receives wages from an employer that paid at least 80% of the wages in his or her base period §108.05(3)(b) disqualifies the claimant from receiving benefits in any week that the wages are for full-time work at a rate of pay that meets certain criteria. The bill provides that "full-time" in §108.05(3) (b) means 32 hours. The intent of this change is to streamline training of staff and claims administration by using a definition of full-time work that is common to other provisions of Chapter 108. No significant fiscal effect is expected.

This proposal was developed and first considered by the Council early this year, before state employee furloughs were required. When the Council approved it a few weeks ago they were not aware that it may disqualify employees who are furloughed for one day of a week from receiving UI benefits. It was neither the Council's nor the Department's intention to foreclose this possibility during the current state furlough period. Therefore the Council is seeking an amendment to the bill to delay the effective date of this provision until July 3, 2011, at which time state furlough days will have run their course. There are relatively few state employees filing for UI benefits so the cost of this amendment is quite small.

#### **Amend Exceptions to Quit Disqualifications: Change Thresholds to 32 Hours**

A worker who quits a job is, in general, disqualified for unemployment insurance benefits until the meet certain requalification requirements. There are exceptions. Two of the quit exceptions, §§108.04(7) (k) and 108.04(7) (o), apply where a claimant works two jobs concurrently. Section 108.04(7)(k) allows a claimant to quit a job of up to 30 hours per week without disqualification where a claimant has lost a full-time job and it is "economically unfeasible" to continue the 30-hour per week work. Section 108.04(7)(o) allows a claimant to quit one job where the claimant quits before receiving notice of termination from a job consisting of at least 30 hours per week. The intent of this provision is to provide an exception to the quit disqualification penalty when a worker quits a job with no knowledge that he or she would be laid off or discharged from the 30-hour per week position. The bill would replace "30-hour" with "full-time" and define full time as 32 hours for both provisions, §§108.04(7) (k) and 108.04(7) (o). The intent of this change is to streamline training of staff and claims administration by using a definition of full-time work that is common to other provisions of Chapter 108. No significant fiscal effect is expected.

#### **Clarify Exceptions for Exclusions from Employment for Indian Tribes**

The bill amends two subdivisions of §108.02(15)(f) to clarify that the option for tribes to exclude certain tribal elected officials and policymakers and advisors from coverage is made under tribal not state law, and that tribal legislative bodies and judiciaries are not political subdivisions of the state. The bill also amends §108.02(15) (g) 1 to clarify that individuals receiving work relief or work training from programs that are funded wholly by tribes are excluded from employment unless a tribe elects otherwise. These are clarifications of existing law and are not expected to change department practices.

### **Correct Forfeiture Language to Reflect Statutory Penalties**

There are three levels of penalties in the statute for unemployment benefit fraud by concealment of material facts by a claimant. The penalty levels were established by 2007 Wis. Act 59. This bill amends §108.04(11) (be) to remove the risk of incorrect interpretations of the provision. Section 108.04(11) (be) provides that: "A claimant shall forfeit benefits *and be disqualified from receiving benefits* for acts of concealment [under the conditions provided in that law.]" Some administrative law judges exhibited confusion as to whether claimants are to be disqualified from receiving benefits even though the three, newly-enacted penalty levels no longer disqualified claimants from benefits. This is a technical change consistent with the intent of 2007 Act 59.

### **Enable Intercept of Federal Tax Refunds for Unemployment Insurance Fraud**

Benefits are overpaid to claimants for various reasons, including fraud in some cases. Various mechanisms are utilized in the process of recovering the overpaid benefits from the claimant. One mechanism is the interception of state tax refunds by the Department of Revenue. This process is used to recover overpayments, whether due to fraud or, more commonly, without fraud.

Recent federal legislation allows states to intercept **federal** tax refunds to recover overpaid benefits. The intercept of federal tax refunds is limited to overpayments due to **fraud**. The bill amends §108.22(8) to enable the intercept of federal tax refunds to collect unemployment insurance benefit overpayments in fraud cases. It will also permit the U.S. Department of Treasury to deduct fees from intercepted amounts to cover the administrative costs of the intercept program. The department estimates it will collect an additional \$1.3 million annually from claimants with this provision.

### **Law Changes Affecting Employers and Unemployment Taxes**

#### **Amend Special Assessment for Interest to Allow Unused Balance to Revert to Reserve Fund**

Since February 2009, the Wisconsin Unemployment Reserve Fund has borrowed from the federal government in order to pay benefits. Over the same period of time, the 2009 Recovery Act provided relief to the states (including Wisconsin) in the form of interest forgiveness on the federal loan. Under the Recovery Act, no interest will accrue on the borrowed funds until after December 2010.

Federal law prohibits the State's use of Reserve Fund dollars to pay interest on federal loans used to pay benefits. The interest payments to the federal government must come from an alternative funding source. Section 108.19(1m) of the Wisconsin statutes authorizes the department to collect a special

assessment from employers to pay the interest to the federal government. If there are unused amounts in the special assessment account after repaying federal loans, the current law provides that those funds may be used for unemployment insurance administration. This bill provides that any unused funds in that account would revert to the Reserve Fund (specifically, the balancing account) and will be used to pay benefits.

### **Incorporate Requirement that Professional Employer Organizations (PEOs) Register with Department of Regulation & Licensing**

Chapter 461 was enacted in 2007 Wis. Act 189 to regulate the industry known as professional employer organizations ("PEOs"). One requirement of Chapter 461 is to require PEOs to register with the Department of Regulation and Licensing. The requirements for licensing a PEO include maintaining working capital of at least \$100,000, a bond or other commitment in the same amount, and to provide an audited financial statement. These requirements are intended to secure the payment of wages and other amounts including unemployment contributions that are payable by the PEO as an employer.

This bill amends §108.02(21e) to include in the definition of "professional employer organization" for unemployment insurance purposes the requirement that the PEO be registered with the Department of Regulation and Licensing. Registration as a "PEO," and the requirements associated with that registration, tend to show that such an entity is truly a responsible employer for purposes of the unemployment program. No fiscal effect is expected.

### **Establish Firm Deadline for Voluntary Contributions**

The bill amends Wis. Stat. §108.18(7) (d) to make the timely payment of voluntary contributions provision consistent with the timeliness provision for other employer reports and payments. The bill is geared for administrative efficiency; it eliminates the grace period and the need to maintain envelopes and proof of mailing. The volume of voluntary contributions is quite small; thus, no significant fiscal effect (interest earnings) is expected from this proposal.

### **Clarify that the Department is an "Adverse Party" in Employers' Circuit Court Actions to Review Tax Decisions**

The bill amends §108.10(4) to state that the department is an "adverse party" when an employer seeks review in the circuit court of a Labor and Industry Review Commission decision under §108.10(4). This will reduce confusion by employers as to which entity must be named as a party and reduce the risk of

technical dismissal of their cases. This will also ensure that the department will be afforded notice of the lawsuit by the employer. (Otherwise, such lawsuits have in some cases proceeded against the Commission alone without notice to the Department.) The Department needs an opportunity to defend its determination and affect the judicial development of the unemployment insurance law. This is merely a clarification of a purely procedural matter and will not have any fiscal effect.

**Protect Claimants and Witnesses in Unemployment Insurance Cases from Retaliation**

This bill strengthens the protection of claimants and creates protection of witnesses in unemployment insurance cases from retaliation by employers for asserting their rights or appearing as a witness in an unemployment hearing. Under the current law, employers may be penalized for various actions, including attempts to "induce an employee to refrain from claiming or accepting benefits or to waive any other right" under the unemployment law. Current law also penalizes discrimination in rehiring, where rehiring is denied based on a claim for benefits. However, **an employer is not prohibited from discharging an employee or otherwise retaliating against an employee for claiming benefits.** **There are no protections for witnesses, some of whom are employees of the employer.** Some witnesses are subpoenaed to testify on the claimant's behalf and may not be voluntary participants. An employer's threats or retaliatory conduct may deter individuals, particularly employees, from willingly participating in unemployment audits, investigations and hearings. The department has received complaints from employees and witnesses who claim to have been discharged from their employment for claiming benefits or testifying. Section 108.24(3), Stats, makes it unlawful to threaten an employee with discharge but does not penalize the act of discharging an employee for claiming benefits. The absence of protection against discharge and other discriminatory or retaliatory action is difficult to reconcile with provisions of current criminal penalties for "attempting to induce" an employee to waive rights. The bill expands the protection of claimants and witnesses to prohibit retaliatory conduct by employers.

The bill increases the maximum fine for violations from \$500 to \$1,000. No significant fiscal effect is expected.

